Petition

81-1570

No. -

Office - Supreme Court, U.S.
FILED
FEB 19 1982
ALEXANDER L. STEVAS
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1981

LEIGH R. HARLOW and EVELYN D. HARLOW,
PETITIONERS,

v.

JOHN B. SARGENT and FREDERIC D. SARGENT,
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JEROME I. MEYERS
P.O. Box 560
37 Main Street
Springfield, VT 05156
Tel: (802) 885-5500
Attorney for Petitioners

Blanchard Press, Inc., Boston, Mass.—Law Printers

I

QUESTION PRESENTED FOR REVIEW

When a bankruptcy court remands a removed case pursuant to Title 28 U.S.C. § 1478(b), and subsequently after a motion for rehearing issues an omnibus order that confirms the original order of remand and in addition dismisses a separate complaint for declaratory judgment, is the omnibus order separable so that the appellate courts have jurisdiction to review the dismissal of the complaint for declaratory judgment notwithstanding the prohibition against review of the order of remand as set forth in 28 U.S.C. § 1478(b)?

TABLE OF CONTENTS

	Page
The Question Presented for Review	I
Table of Authorities	III
Reference to Official and Unofficial Reports of Opinions Delivered in the Courts Below	2
Statement of Jurisdiction	2
Statutes That the Case Involves	3
Statement of the Case	3
Reasons for the Allowance of the Writ	5
Conclusion	8
Addendum	A-1

Table of Authorities

Mueller v. *Nugent*, 184 U.S. 1, 46 L. Ed. 405, 22 S.Ct. 269 (1901) 6

Thermtron Prods., Inc. v. *Hermansdorfer*, 423 U.S. 336, 46 L. Ed. 2d 542, 96 S.Ct. 584 (1976) 7

In the
Supreme Court of the United States

OCTOBER TERM, 1981

No. -

LEIGH R. HARLOW and EVELYN D. HARLOW,
PETITIONERS,

v.

JOHN B. SARGENT and FREDERIC D. SARGENT,
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

LEIGH R. HARLOW and EVELYN D. HARLOW, the petitioners herein, pray that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in the above entitled case on November 27, 1981. (C.A. No. 81-5043; D.C. No. Civil Action 81-117)

Official and Unofficial Reports of Opinions Delivered in the Courts Below

The opinion of the United States Court of Appeals for the Second Circuit (C.A. No. 81-5043) was not officially reported. A true and correct copy of the original opinion of the Circuit Court of Appeals for the Second Circuit is appended hereto as "Appendix A".

The opinion of the United States District Court for the District of Vermont is entitled *Harlow* v. *Sargent* and is reported at 14 BR 267, 8 BCD 162, and 5 CBC 2d 218. A true and correct copy of the opinion of the United States District Court for the District of Vermont is appended hereto as "Appendix B".

The memorandum and order on motion for rehearing, complaint to punish for contempt and for declaratory judgment, of the United States Bankruptcy Court for the District of Vermont, is entitled *In Re Harlow* and is reported at 12 BR 1. A true and correct copy of the memorandum and order on motion for rehearing is appended hereto as "Appendix C".

The memorandum and order of the United States Bankruptcy Court for the District of Vermont dismissing debtors' motion to remove, is entitled *In Re Harlow* and is reported at 13 BR 475 and 5 CBC 2d 214. A true and correct copy of the memorandum and order dismissing debtors' application of removal is appended hereto as "Appendix D".

Statement of Jurisdiction

The judgment and opinion of the Court of Appeals for the Second Circuit was entered on November 27, 1981; the date of the mandate is December 21, 1981. No time of entry of the judgment was indicated thereon. The jurisdiction of this Court is invoked pursuant to Title 28 U.S.C. § 1254(1).

Statutes That the Case Involves

TITLE 28 UNITED STATES CODE § 1478:

(a) A party may remove any claim or cause of action in a civil action, other than a proceeding before the United States Tax Court or a civil action by a Government unit to enforce such governmental unit's police or regulatory power, to the bankruptcy court for the district where such civil action is pending, if the bankruptcy courts have jurisdiction over such claim or cause of action.

(b) The court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground. An order under this subsection remanding a claim or cause of action, or a decision not so remanding, is not reviewable by appeal or otherwise.

TITLE 11 UNITED STATES CODE § 362:

The provisions of this statute are lengthy; the pertinent text is set forth and appended hereto as "Appendix F".

Statement of the Case

Petitioners herein filed a petition for relief as debtors under Chapter 13 of Title 11 United States Code on November 20, 1980. Original jurisdiction was obtained by the filing of said petition. The basis of federal jurisdiction is Title 28 U.S.C. § 1471.

Prior to the filing of the petition under Chapter 13, a judgment of foreclosure was entered in the Windsor Superior Court of the State of Vermont in favor of the respondents and against the petitioners. Said order and judgment of foreclosure fixed the date for sale of the foreclosed premises as December 1, 1980.

On November 21, 1980, petitioners filed an application for removal of the foreclosure proceeding pursuant to 28 U.S.C. § 1478.

Thereafter, on December 1, 1980, at 12:00 noon, respondents proceeded with the foreclosure sale. Relief from the automatic stay (11 U.S.C. § 362) was never obtained by respondents. At 2 P.M. of the day of the foreclosure sale,

December 1, 1980, a hearing was held before the United States Bankruptcy Court, District of Vermont, on petitioners' application for removal of the foreclosure proceeding.

On December 30, 1980, petitioners filed a complaint with the bankruptcy court to punish the respondents herein for contempt for proceeding with the foreclosure sale without obtaining relief from the automatic stay (11 U.S.C. § 362), and to obtain a declaratory judgment declaring null and void all actions of respondents taken subsequent to the filing of the joint petition under the Bankruptcy Code.

On January 2, 1981, bankruptcy court entered an order dismissing petitioners' application for removal. (Appendix D.)

On January 9, 1981, petitioners moved for a rehearing before bankruptcy court pursuant to Bankruptcy Rule 812.

On January 16, 1981, petitioners filed a motion for summary judgment on the complaint to punish respondents for contempt and to obtain declaratory judgment.

On March 16, 1981, a memorandum and order was entered by the bankruptcy court on the petitioners' motion for rehearing. In said order the bankruptcy court confirmed the order dismissing the application for removal, dismissed petitioners' complaint to punish for contempt and to obtain declaratory judgment, dismissed petitioners' motion for summary judgment, and remanded the foreclosure action pending in Vermont Superior Court *nunc pro tunc*. (Appendix C.)

Thereafter, petitioners filed a timely notice of appeal to the District Court for the District of Vermont from the order of the bankruptcy court entered in this case on March 16, 1981, and from each and every part of said order.

Thereafter, respondents moved district court to dismiss the appeal on the grounds that the order of the bankruptcy court is not reviewable pursuant to 28 U.S.C. § 1478(b). District court granted respondents' motion to dismiss the appeal and affirmed the orders of the bankruptcy court. (Appendix B.)

Petitioners thereafter filed a timely notice of appeal to the Court of Appeals for the Second Circuit. The court of appeals affirmed the judgment of the district court and in its opinion held that "since there is no jurisdiction to entertain an appeal,

appellants' other claims are not properly before the Court." (Appendix A.) This application for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit is directed to that issue: petitioners hold that the court of appeals did have jurisdiction to entertain the appeal of petitioners' other claims; that although review of an order of remand may be prohibited, an omnibus order containing such order of remand is separable; and that the part of the order dismissing the complaint is not barred from review by the provisions of 28 U.S.C. § 1478(b).

Reasons for Granting the Writ

The district court in its decision dismissing the appeal from the bankruptcy court held that 28 U.S.C. § 1478(b) prohibits "... this court from exercising the power to review the order of remand ...." The court of appeals held that there was no jurisdiction to entertain an appeal and therefore dismissed petitioners' other claims. The notice of appeal from the final order of the bankruptcy court clearly stated that an appeal was being taken from each and every part of the order. Petitioners submit that the decisions and opinions of the district court and the court of appeals are an extension of the statute [28 U.S.C. § 1478(b)] that was not intended by Congress.

The courts below have decided an important question of federal law without consideration of the issues; therefore it should be settled by this Court.

This issue of statutory construction is a matter of first impression. Did Congress intend to prohibit review of remand orders only? Or is any order that comprises a remand pursuant to 28 U.S.C. § 1478(b), together with any and all other matters contained therein, likewise barred from review in its entirety?

The bankruptcy court dismissed the petitioners' complaint to punish for contempt and to obtain declaratory judgment

declaring void all those actions taken by respondents in violation of the automatic stay provided in 11 U.S.C. § 362.

Petitioners appealed from a final order. To hold that there is no jurisdiction to entertain an appeal from an order dismissing a complaint for declaratory judgment is insupportable. It is a statutory construction that works as an abrogation of petitioners' rights to review of the issues contained in that order other than the remand. Petitioners respectfully submit that the actions of the courts below have departed from the accepted and usual course of judicial proceedings so as to call for the exercise of this Court's power of supervision. The denial of petitioners' right to review of the dismissal of the complaint works an injustice upon the petitioners of sufficient magnitude that this Court should act to correct same.

Title 28 U.S.C. § 1478(b) was enacted by Congress in conjunction with the Bankruptcy Reform Act of 1978. There is a dearth of material in the Congressional committee reports accompanying the passage of this particular part of the legislation.

An analogy was made in the opinion of the district court to 28 U.S.C. § 1447, which concerns removal and remand in diversity cases. However, different principles of law apply in a bankruptcy case. There is no similarity between bankruptcy and diversity jurisdiction, and the reasons for barring review are dissimilar.

The automatic stay has been the keystone of bankruptcy administration since 1901. (*Mueller* v. *Nugent*, 184 U.S. 1, 46 L.Ed. 405, 22 S.Ct. 269) Construction of any statute that limits the fundamental rule that an automatic stay is inviolable mandates judicial review.

Petitioners further submit that since the prohibition against review set forth in 28 U.S.C. § 1478(b) is not of common law origin, it should be strictly construed. A strict construction of this statute would result in a finding that in an omnibus order, only an order of remand is barred from review. To hold other-

wise would be an illogical construction of the statute. Petitioners submit that this case presents an important question of federal law that should be settled by this Court: to wit, the construction of the prohibition against review of an omnibus order that contains and incorporates other substantive dispositive provisions.

The dismissal of petitioners' complaint for declaratory judgment in effect relieved respondents from the automatic stay provided in 11 U.S.C. § 362. 11 U.S.C. § 362(d) specifically sets forth those criteria under which the stay may be lifted. Petitioners are entitled to a ruling on the applicability of § 1478(b) to § 362(d) when a rehabilitative proceeding is at stake.

The collateral issue of significance presented by this case is whether an automatic stay can be lifted without application of the statutory criteria of § 362(d). Certainly, § 1478(b) and § 362(d) should be read *in pari materia* in a case such as this. As it stands, this issue, though properly raised, has been ignored. This issue is of importance to this Court because of the prominence of litigation concerning automatic stay relief.

The principle that the court of appeals cannot review an order of remand (other than one remanding a case removed under the Civil Rights removal section) was rejected by this Court in *Thermtron Prods., Inc.* v. *Hermansdorfer*, [423 U.S. 336, 96 S.Ct. 584, 46 L.Ed.2d 542, (1976)]. There it was held that mandamus was a proper remedy in a case in which the district court remands on grounds that are not authorized by statute, or when the district court exceeds its authority. In *Thermtron*, the district court remanded a case otherwise within its jurisdiction on the grounds of crowded dockets in the federal court. It is not an unreasonable extension of this rule to conclude that if this Court can review a case where the district court exceeded its authority, notwithstanding the bar against review, then the court of appeals should have the power to review an improper order dismissing a complaint even though coupled with a nonreviewable remand order.

Neither the court of appeals nor the district court in this case has addressed the extent of the restriction against review on an order of remand. Both have unreasonably relied upon the restriction against review without consideration of the dismissal of petitioners' complaint. The denial of the right of review is an abrogation of a substantial right and should be properly supported by appropriate judicial reasoning.

Conclusion

Because of the extension of the prohibition against review of an order of remand to other substantive matters contained in such order and the prominence of litigation arising under the Bankruptcy Reform Act of 1978, and in particular, automatic stay relief, petitioners respectfully pray that this Court grant the Writ of Certiorari to the United States Court of Appeals for the Second Circuit together with such other and further relief as it may deem proper.

Dated: at Springfield, Vermont this 22nd day of February, 1982

Respectfully submitted,

JEROME I. MEYERS
P.O. Box 560
37 Main Street
Springfield, VT 05156
Tel: (802) 885-5500
Attorney for Petitioners

Appendix

APPENDIX A

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

United States Court of Appeals
For the Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-seventh day of November one thousand nine hundred and eighty-one.

Present:

HONORABLE IRVING R. KAUFMAN,
HONORABLE WILLIAM H. TIMBERS,
HONORABLE THOMAS J. MESKILL,
Circuit Judges,

81-5043

LEIGH R. HARLOW AND EVELYN D. HARLOW,
APPELLANTS,

v.

JOHN B. SARGENT AND FREDERIC D. SARGENT,
APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Vermont, and was argued by counsel.

ON CONSIDERATION WHEREOF, IT IS NOW HEREBY ORDERED, ADJUDGED, AND DECREED THAT THE JUDGMENT OF SAID DISTRICT COURT BE AND IT HEREBY IS AFFIRMED.

1. APPELLANTS CHALLENGE THE CONSTITUTIONALITY OF 28 U.S.C. § 1478(b). They argue that, when a Bankruptcy Court's remand order concerns property which is part of a proposed bankruptcy plan pursuant to 11 U.S.C. §§ 1301-30, the statutory prohibition against appeal of that order works a deprivation of property without due process of law. The power of a federal court to conduct appellate review extends only so far as authorized by Congress. *See Baltimore Contractors, Inc.* v. *Bodinger*, 348 U.S. 176, 181 (1955). The right to appellate review is not, in all instances, a necessary element of due process.
2. Moreover, the provisions of the Bankrupty Act should be upheld against a constitutional challenge unless they are "so grossly arbitrary and unreasonable as to be incompatible with fundamental law." *In re Hill*, 4 B.R. 310, 315 (N.D. Ohio 1980).
3. Section 1478(b) is not per se unconstitutional or "arbitrary." Nor has it affected appellants Harlow in an unconstitutional manner. They had full opportunity to protect their property rights in a state proceeding. The Windsor Vermont Superior Court granted the Sargents' motion for default judgment after the Harlows, with assistance of counsel, failed to file a verified answer. The property was ordered sold. Prior to the sale, the Harlows attempted to have the foreclosure proceeding removed to the Bankruptcy Court.
4. 11 U.S.C. §§ 1301-30 is intended to protect and encourage rehabilitation by debtors. This policy, however, does not extend to allowing a debtor, who has had his day in court, to relitigate the same issue in Bankruptcy Court at added expense and time to his creditor. *See In re Tidwell*, 4 B.R. 100 (N.D. Tex. 1980). This reasoning is particularly appli-

cable when questions of state law, such as in this foreclosure action, are involved. *See In re Calabria*, 5 B.R. 73 (D. Conn. 1980). Accordingly, Judge Holden properly dismissed the Harlows' appeal for lack of subject matter jurisdiction.

5. Since there is no jurisdiction to entertain an appeal, appellants' other claims are not properly before the court.

(s) IRVING R. KAUFMAN
IRVING R. KAUFMAN,
(s) WILLIAM H. TIMBERS
WILLIAM H. TIMBERS,
(s) THOMAS J. MESKILL
THOMAS J. MESKILL, *Circuit Judges.*

[STAMP—USCA, SECOND CIRCUIT
Filed, Nov. 27, 1981
A. DANIEL FUSARO, *Clerk*]

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

No. 81-117

LEIGH R. HARLOW AND EVELYN B. HARLOW,
APPELLANTS

v.

JOHN B. SARGENT AND FREDERIC D. SARGENT,
APPELLEES

(D. VERMONT, JUNE 29, 1981,
JAMES S. HOLDEN, *District Judge*)

HOLDEN, District Judge: This case comes before the court as an appeal from a Bankruptcy Court decision in which the underlying foreclosure proceedings were remanded to the Windsor Superior Court following appellant's petition for removal from that state court to the Bankruptcy Court in this District. *Harlow* v. *Sargent*, Adversary No. 80-146 (Bkr. Vt. Jan. 2, 1981), *aff'd on reh.* (Mar. 16, 1981).

Appellees have moved to dismiss this appeal on alternate grounds: that under 28 U.S.C. § 1478(b) this court has no jurisdiction to hear the appeal, and that appellants' failure to file their brief in support of the appeal in a timely manner requires dismissal. Appellants contend the motion should be denied on both grounds. They raise a constitutional challenge to the statutory prohibition against appeals from remand orders found in § 1478(b), and further argue that the appeal should not be dismissed as untimely.

The record on appeal shows that in June, 1980 appellees instituted a foreclosure action in Windsor Superior Court on a mortgage they held on appellants' land. On October 29, 1980 the court granted appellee's motion for default judgment and ordered the property sold. On the same day, appellants moved for review of the default judgment. Prior to the sale, appellants also filed in the Bankruptcy court a petition for relief under Chapter 13 of the Bankruptcy Act, 11 U.S.C. § 1301 *et seq.*, and for removal of the foreclosure action.

The Superior Court denied the appellants' motion for review of the default judgment. The sale of the property took place as ordered and was subsequent;y confirmed by the court. Appellants then filed a complaint against appellees in the Bankruptcy Court, seeking to have them punished for contempt, through the sale, of the automatic stay provisions of 11 U.S.C. § 362 and requesting a judgment declaring null and void all state proceedings since the Chapter 13 filing.

The Bankruptcy Court dismissed appellants' motion for removal to that court. While recognizing that the new Bankruptcy Act might allow the court to assume jurisdiction of the foreclosure action, the court concluded that, under § 1478(b), equitable considerations dictated remand to the state court. The court noted that the foreclosure action had been fully adjudicated in the state proceedings, that the debtors had had full opportunity to protect their interests throughout those proceedings, and that under these circumstances, the mortgagees should not be compelled to prosecute another foreclosure proceeding. Memorandum and Order, No. 80-252 (Jan. 2, 1981).

The debtors moved for a rehearing, asserting the Order was based on erroneous statements of fact and conclusions of law. The court confirmed its prior decision in another memorandum and order, emphasizing that a party cannot relitigate an action by means of removal where, as here, they appear simply to be dissatisfied with the initial result. Memorandum and Order, No. 80-252 (Mar. 16, 1981). The debtors then brought this appeal from that decision.

Section 1478(b) prohibits an appeal from the remand of an action removed to the Bankruptcy Court:

> "(b) The court to which [a] claim or cause of action is removed may remand such claim or cause of action on any equitable ground. An order under this subsection remanding a claim or cause of action, or a decision not so remanding, is not reviewable by appeal or otherwise."

Appellees rely on the clear directive of the statute in support of their motion to dismiss this appeal. Appellants challenge the statute's constitutionality, alleging that when a remand order concerns property which is part of a Chapter 13 rehabilitation plan, the inability to appeal that order works a deprivation of property without due process of law.

[1] The power of a federal court to conduct appellate review extends only so far as expressly authorized by Congress and that jurisdiction cannot be extended or reduced, directly or indirectly, by the courts. *See Baltimore Contractors, Inc.* v. *Bodinger*, 348 U.S. 176, 181 (1955). No right to appellate review existed at common law, nor has it been considered a necessary element of due process. *McKane* v. *Durston*, 153 U.S. 684, 688 (1893); *see also Griffin* v. *Illinois*, 351 U.S. 12, 18 (1955).

Orders remanding to the state court actions removed to the federal district court are not reviewable, except in civil rights cases. 28 U.S.C. § 1447(d). The purpose of this bar on appellate review is to spare litigants delay, *In Re McNeil Bros.*, 259 F.2d 386, 388 (1st Cir. 1958), and is consistent with the strong federal policy against allowing appeals from preliminary rulings establishing a forum. *See U.S. Tour Operators Ass'n* v. *Trans World Airlines*, 556 F.2d 126, 129 (2d Cir. 1977).

[2] In light of these established principles, the prohibition against appeals found in § 1478(b) is not *per se* unconstitutional, nor can it be said that the statute has operated against

these appellants in an unconstitutional manner. The record indicates that the appellants had full opportunity to protect their property rights in the state proceedings, whether or not they chose to avail themselves of those opportunities. As Judge Marro recognized, Chapter 13 is intended to protect and encourage rehabilitation by debtors. However, this policy does not extend to allow such a debtor, who had had his day in court, to relitigate the same issues in the Bankruptcy Court, causing additional expense and delay to his opponent. *See In Re Tidwell*, 4 B.R. 100 (N.D. Tex. 1980). This reasoning is particularly aposite where the suit involves questions of state law, as in this foreclosure action. *See In Re Calabria*, 5 B.R. 73, 75 (D. Conn. 1980).

Since 28 U.S.C. § 1447(d) and § 1478(b) prohibit this court from exercising the power to review the order of remand, *Kloeb* v. *Armour*, 311 U.S. 199, 205 (1940), the appellees' motion to dismiss the appeal is hereby *Granted. It Is So Ordered.*

APPENDIX C

In Re Harlow

Bankruptcy No. 80-252.

IN RE LEIGH R. HARLOW and
EVELYN B. HARLOW, DEBTORS.

United States Bankruptcy Court,
D. Vermont

March 16, 1981.

Jerome I. Meyers, Ascutney, Vt., for debtors.
Matthew T. Birmingham, Ludlow, Vt., for John B. Sargent and Frederic D. Sargent.

MEMORANDUM AND ORDER ON MOTION FOR REHEARING, COMPLAINT TO PUNISH FOR CONTEMPT AND FOR DECLARATORY JUDGMENT

CHARLES J. MARRO, Bankruptcy Judge.

On November 21, 1980 the Debtors filed an application, pursuant to 28 U.S.C. § 1478, for removal of a pending action for foreclosure from the Superior Court of the State of Vermont to this U.S. Bankruptcy Court. This petition was resisted by the mortgagees, John B. Sargent and Frederic D. Sargent, the plaintiffs in the state foreclosure action. After hearing, this Court on January 2, 1981 entered an order, supported by a memorandum, dismissing the application for removal.

This matter is again before this court on the Debtors' Motion for Rehearing under Rule 812 which is predicated on the argument that the Court's Order is based upon erroneous statements of fact and conclusions of law. They assert that the

two cases recited by this Court in its memorandum i.e. *In Re Project Oneco, Inc.* 1 Collier 2d 711 and *In Re Calabria*, 2 Collier 2d 113 have not been properly applied.

[1] It is true as the Debtors contend, that *In Re Project Oneco, Inc.* recites that "abstention is proper only 'where the interests of the estate and all parties will best be served.....' " But the Court goes on to say, "Here, the best interests of all parties will be served by the quick resolution of the issues." In the instant case the issues had been determined by the State Court when it entered its default judgment of foreclosure against the debtors. Their failure to file a verified answer as required by the Court rule while they were represented by counsel resulted in the entry of the foreclosure decree. Having been summoned and given the opportunity to respond by the proper pleading they had their day in Court. It now appears that their only purpose in seeking removal is to litigate an issue which has already been determined. In effect they are dissatisfied with the result in the state court and now plead for another trial *de novo* hoping for a favorable result. In entering the order of dismissal this Court did in fact take into account the interest of the debtor as well as that of the mortgagees. They have expended time and money in the state foreclosure action and should not be penalized because of any failure or neglect of the debtors.

This Court also has some reservation as to the good faith of the debtors in filing under Chapter 13. The schedules show that they had previously made an assignment for the benefit of creditors under which most, if not all, of the unsecured creditors had received payments which they claim extinguished all of the debts affected by the assignment. It would, therefore, appear that their only purpose of filing under Chapter 13 long after the foreclosure proceeding was initiated in state court was not only to thwart the foreclosure but to negate the legal effect of a decree which had previously been obtained in state court in accordance with the provisions of law.

The debtors stress the following language from *In Re Conway*, 5 B.R. 251 (Bkrtcy.):

> "While the court can sympathize with the creditor's belief that the prior petitions were filed for the 'sole purpose and intention of avoiding foreclosure of the mortgaged premises,' [complaint ¶ 18], the overwhelming majority of Chapter 13 petitions are filed with that very goal in mind. Such is the relief afforded by Congress to the debtor who wishes the protection of this court. It is the duty and responsibility of this court to protect the rehabilitation-oriented debtor."

[2] This court does not agree that the overwhelming majority of Chapter 13 petitions are filed to avoid foreclosure. The reported cases since the effective date of the Bankruptcy Code do not support this conclusion. It is true that it is the duty and responsibility of the Bankruptcy Court to protect the rehabilitation-oriented debtor. However, this does not mean that a debtor who had had his day in court should be afforded another opportunity to litigate the same issues under the aegis of the Bankruptcy Court at the expense of and to the detriment of a creditor who has complied with all of the legal requirements in obtaining a foreclosure decree.

The debtors contend that *In Re Calabria*, supra, is not applicable since it is straight bankruptcy and not a Chapter 13. This argument is ill founded. The basis for remanding is Section 1478(b) of 28 U.S.C. which reads:

> "The Court to which such claim or cause is removed may remand such claim or cause of action or any equitable ground—"

It makes no distinction between a liquidation under Chapter 7 or a Chapter 13 case. Had such been intended by Congress the proper wording would have been incorporated in the statute. The broad scope of the above section is recognized by the Court in the *Calabria* case at 2 Collier 2nd 115 as follows:

> "Section 1478(b) does not exclude an action involving property of a debtor from the power to remand. It broadly provides that the Bankruptcy Court to which a claim or cause of action is removed may remand it on any equitable ground. It is not limited to cases over which the Bankruptcy Court does not have exclusive jurisdiction (BRA Chap. 90 sec. 1471(a)) to the exclusion of cases over which exclusive jurisdiction exists."

The Order of this Court entered January 2, 1981 which, in effect, remanded the foreclosure action to the state court is supported by *In Re Tidwell*, 6 BCD 622. In that case the situation was strikingly similar. The state court had determined the debtors' ownership in certain property. Recognizing the bankruptcy court's jurisdiction as extending to all claims or causes of action relating to a bankruptcy case, the *Tidwell* court pointed out that it was also given authority to decline jurisdiction in the interest of justice under 28 U.S.C. § 1471(d), or to remand on equitable grounds under 28 U.S.C. § 1478(b). In remanding, the bankruptcy court succinctly stated:

> "There is jurisdiction in the bankruptcy court since the state court action is related to the bankruptcy proceeding. It clearly meets the relationship test because the debtors are parties to both. There are, however, strong equitable grounds to order the remand. First, the state court action does not interfere with the bankruptcy proceeding. The state court determined the debtors' ownership interest in certain property. Since the Bankruptcy Code does not provide rules for determining whether the debtor had an interest in property, it is necessary to look to non-bankruptcy law, generally state law, to make this determination. 4 Collier on Bankruptcy Para. 541.02 (15th Ed. 1979). Retaining the cause of action would require this court to apply the same law the state court already applied in making its determination. Second, [3]

this cause of action has been fully tried. To retain it would result in added expense to the litigants and loss of time and judicial economy. The debtors may appeal within the state court system to correct any errors in the trial. Permitting the removal of this case would in effect give plaintiff's a second trial and would not expedite or benefit the bankruptcy case. It is not the function of removal under § 1478 to afford an alternative to a state court appeal. Absent other reasons the bankruptcy court should refrain from the exercise of removal jurisdiction. The case shall be remanded to the state court."

[3] It is evident that the decision by the bankruptcy court as to abstention and removal should be made on a case to case basis. Its broad discretion is recognized in an article appearing in 39 Federal Bar Journal 1-2 at page 81 where in commenting in abstention under Sec. 1471(d) which is the same in principle as Sec. 1478(b) the following is stated:

"The all encompassing jurisdiction of the bankruptcy court may frequently give rise to situations in which the bankruptcy court, although the court of original jurisdiction, should refuse to hear certain matters. 28 U.S.C. Sec. 1471(d) gives the bankruptcy court that discretion. The abstention provision is broadly stated allowing wide latitude among bankruptcy courts to turn down cases over which the court does exercise original, but not exclusive jurisdiction. The abstention language recognizes that many occasions will arise when determination of an issue or question of law is best left to a court that decides similar issues regularly, especially if the issue or question of law is one that requires a particular expertise which the bankruptcy court lacks. Similarly, situations will occur in which the interest of justice will dictate that a case continue in the original forum, rather than the bankruptcy court. The doctrine of abstention embodied in Subsection 1471(d) is substantially a codification of practice long encouraged in the federal court system."

AS TO COMPLAINT OF DEBTORS FOR CONTEMPT AND MOTION FOR SUMMARY JUDGMENT

[4] It is clear that the mortgagees as plaintiffs in the state foreclosure action were in technical violation of the automatic stay prescribed by the Bankruptcy Code. But it is equally questionable that they should be punished for contempt. They seemed to be torn between compliance with the stay and carrying out the judgment order of the state court in executing the foreclosure sale. Their failure to carry out the latter, as they point out, would make them subject to contempt under 70 of the Vermont Rules of Civil Procedure which reads:

> "If a judgment directs a party to execute the conveyance, in land—or to perform any other specific act and the party fails to comply with the time specified—the Court may also in proper cases adjudge the party in contempt."

This court is satisfied that the circumstances in this case do not warrant punishment for contempt. In any event the issue has become moot by this Court's remanding to the state court.

The debtors also complain that by remanding they are deprived of the benefit of rehabilitation under Chapter 13 of the Bankruptcy Court. Unfortunately this has not resulted by the action of this Court. Rather they are victims of their own misjudgment. They had an opportunity to file under Chapter 13 when they made the assignment for the benefit of creditors but they chose the latter course. They, then were faced with the foreclosure action in state court, chose to defend it, were unsuccessful and as a last resort sought the protection of the Bankruptcy Court in an attempt to reverse an adverse decision by the state tribunal. With this course of conduct they are not entitled to any further consideration by this Court.

ORDER

Accordingly, IT IS ORDERED as follows:

1. The Order of the Court dismissing the application of the Debtors for removal entered January 2, 1981 is confirmed.

2. The complaint of the Debtors to punish for contempt and for Declaratory Judgment filed December 30, 1980 is DISMISSED.

3. The Motion of the Debtors for summary judgment filed January 16, 1981 is DISMISSED.

4. The foreclosure action pending in Vermont Superior Court is hereby remanded and the State Court may proceed with the case *nunc pro tunc*.

APPENDIX D

IN RE
LEIGH B. HARLOW AND EVELYN B. HARLOW, DEBTORS

No. 80-00252

(D. VERMONT, JANUARY 2, 1981,
CHARLES J. MARRO, *Bankruptcy Judge*)

MARRO, Bankruptcy Judge: This is a contested proceeding on the Application of the Debtors to remove a pending foreclosure action from State Court. Appearances are:

Jerome I. Meyers, Esquire, for the Debtors,

Fink and Birmingham, P.C., for John B. Sargent and Frederic D. Sargent, mortgagees—plaintiffs in the foreclosure proceeding.

The foreclosure action which the Debtors seek to remove to the Bankruptcy Court was instituted in the Windsor Superior Court by John B. Sargent and Frederic D. Sargent as mortgagees against the Debtors and Agway, Incorporated, by Complaint dated June 6, 1980 with summons served on June 17, 1980.

This foreclosure action has proceeded to a default judgment against the Debtors because of their failure to file a verified answer as required by the pertinent state court rule.

In their Application for Removal the Debtors allege that the property involved in the foreclosure action is their homestead farm and that they have good and equitable defenses to the action under appropriate law and that the interests of justice will best be served by granting such removal.

The plaintiffs in the state foreclosure proceeding resist removal on the ground that no verified answer has been filed; that the alleged real defenses to the foreclosure action have not existed and do not exist nor have they been raised properly in the more than seven months that the foreclosure action has been filed in the Windsor Superior Court.

The Debtors seek removal to 28 U.S.C. § 1478 which provides as follows:

> "§ 1478. Removal to the bankruptcy courts.
>
> "(a) A party may remove any claim or cause of action in a civil action, other than a proceeding before the United States Tax Court or a civil action by a Government unit to enforce such governmental unit's police or regulatory power, to the bankruptcy court for the district where such civil action is pending, if the bankruptcy courts have jurisdiction over such claim or cause of action.
>
> "(b) The court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground. An order under this subsection remanding a claim or cause of action, or a decision not so remanding, is not reviewable by appeal or otherwise."

The assumption of jurisdiction by removal over a foreclosure action pending in state court presents a novel situation. As pointed out by the plaintiff-mortgagees in that action the foreclosure of a mortgage on real property is a purely state proceeding. See 12 V.S.A. 4523 under which action to foreclose a mortgage shall be brought before the county court (now superior court) of the county where the land lies with all proceedings to be held before the presiding judge alone. (subsections a and c).

Under the old Bankruptcy Act it was inconceivable that the Bankruptcy Court could assume jurisdiction over a state foreclosure action. This no longer prevails. Now, under the Bankruptcy Code, specifically by virtue of 28 U.S.C. 1471 the jurisdiction of the Bankruptcy Court has been greatly expanded. Under this section the Bankruptcy Court, as an adjunct of the District Court, has original and exclusive jurisdiction of all causes under Title 11 and also has original but not exclusive jurisdiction of all civil proceedings arising under Title 11 or arising in or related to cases under Title 11. Further the Bankruptcy Court in which a case under Title 11 is com-

menced shall have exclusive jurisdiction of all of the property, wherever located, of the debtor, as of the commencement of such case. See subsections a, b and e of 28 U.S.C. 1471.

The pervasive jurisdiction granted to the Bankruptcy Court under section 1471 is defined in the House Report as follows:

> "Subsection (b) is a significant change from current law. It grants the bankruptcy court original (trial), but not exclusive, jurisdiction in all civil proceedings arising under title 11 or arising under or related to cases under title 11. This is the broadest grant of jurisdiction to dispose of proceedings that arise in bankruptcy cases under the bankruptcy code. *Actions that formerly had to be tried in State Court or in Federal district court,* at great cost and delay to the estate, may now be tried in the bankruptcy courts. The idea of possession or consent as the sole bases for jurisdiction is eliminated. The bankruptcy court is given in personam jurisdicton (sic) as well as in rem jurisdiction to handle everything that arises in a bankruptcy case.
>
> "The jurisdiction granted is of all proceedings arising under title 11 or arising under or related to a case under title 11. The bill uses the term 'proceeding' instead of the current 'matters and proceedings' found in the Bankruptcy Act and Rules. The change is intended to conform the terminology of title 28, under which anything that occurs within a case is a proceeding. Thus, proceeding here is used in its broadest sense, and would encompass what are now called contested matters, adversary proceedings, and plenary actions under the current bankruptcy law. It also includes any disputes related to administrative matters in a bankruptcy case.
>
> "The use of the term 'proceeding,' though, is not intended to confine the bankruptcy case. Very often, issues will arise after the case is closed, such as over the validity

of a purported reaffirmation agreement, proposed 11 U.S.C. 524(b), the existence of prohibited post-bankruptcy discrimination, proposed 11 U.S.C. 525, the validity of securities issued under a reorganization plan, and so on. The bankruptcy courts will be able to hear these proceedings because they arise under title 11.

"The phrase 'arising under' has a well defined and broad meaning in the jurisdictional context. By a grant of jurisdiction over all proceedings arising under title 11, the bankruptcy courts will be able to hear any matter under which a claim is made under a provision of title 11. For example, a claim of exemptions under 11 U.S.C. 522 would be cognizable by the bankruptcy court, as would a claim of discrimination in violation of 11 U.S.C. 525. Any action by the trustee under an avoiding power would be a proceeding arising under title 11, because the trustee would be claiming based on a right given by one of the sections in subchapter III of chapter 5 of title 11. Many of these claims would also be claims arising under or related to a case under title 11. Indeed, because title 11, the bankruptcy code, only applies once a bankruptcy case is commenced, any proceeding arising under title 11 will be in some way 'related to' a case under title 11. In sum, the combination of the three bases for jurisdiction, 'arising under title 11,' 'arising under a case under title 11,' and 'related to a case under title 11,' will leave no doubt as to the scope of the bankruptcy court's jurisdiction over disputes." Emphasis supplied.

It seems abundantly clear that the foreclosure action now pending in the State Court is one over which the Bankruptcy Court could assume jurisdiction by removal pursuant to 28 U.S.C. 1478. However, under subdivision (b) of this section the bankruptcy court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground and an order remanding or not remanding is

not reviewable. This right of the Bankruptcy court to abstain from an action removed pursuant to 28 U.S.C. 1478(a) should only be exercised where the interests of all the parties would be best served. In Re Project Oneco, Inc. 1 Collier 2d 711.

[1] The plaintiff mortgagees have in their memorandum incorporated a request to remand on equitable grounds. They recite that the foreclosure action has progressed to the entry of a default judgment; that the debtors have had full opportunity to defend the action and to present the defenses which they now claim exist; that they have failed to file a verified answer as required by the State Court rule; that their motion for review has been denied by the State Court; that as mortgagees they have gone to considerable expense by way of attorney's fees and court costs and that the debtors over a period of seven months since the institution of the foreclosure action have been given the full opportunity to present whatever legal defense they might have had to the foreclosure. In effect, they have had their day in court.

The record in the State case seems to support the mortgagees' position and they should not be compelled to come into Bankruptcy Court to prosecute another foreclosure proceeding *ab initio* at additional expense and delay. Equity dictates otherwise. If the debtors have any other rights such as exemptions these may be severed and left for determination by the Bankruptcy Court. See In Re Calabria 2 Collier 2d Sec. 113.

Order

Upon the foregoing, It Is Ordered that the Motion of the Debtors to Remove is *Dismissed.*

APPENDIX E

JUDGMENT SOUGHT TO BE REVIEWED

United States Court of Appeals
For the Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-seventh day of November one thousand nine hundred and eighty-one.

Present:

HONORABLE IRVING R. KAUFMAN,
HONORABLE WILLIAM H. TIMBERS,
HONORABLE THOMAS J. MESKILL,
Circuit Judges,

81-5043

LEIGH R. HARLOW AND EVELYN D. HARLOW,
APPELLANTS,

v.

JOHN B. SARGENT AND FREDERIC D. SARGENT,
APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Vermont, and was argued by counsel.

ON CONSIDERATION WHEREOF, it it now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

(s) IRVING R. KAUFMAN
IRVING R. KAUFMAN,
(s) WILLIAM H. TIMBERS
WILLIAM H. TIMBERS,
(s) THOMAS J. MESKILL
THOMAS J. MESKILL, *Circuit Judges.*

APPENDIX F

Title 11 United States Code § 362

§ 362. Automatic stay.

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title operates as a stay, applicable to all entities, of—

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor.

(b) The filing of a petition under section 301, 302, or 303 of this title does not operate as a stay—

(1) under subsection (a) of this section, of the commencement or continuation of a criminal action or proceeding against the debtor;

(2) under subsection (a) of this section, of the collection of alimony, maintenance, or support from property that is not property of the estate;

(3) under subsection (a) of this section, of any act to perfect an interest in property to the extent that the trustee's rights and powers are subject to such perfection under section 546(b) of this title;

(4) under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

(5) under subsection (a)(2) of this section, of the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

(6) under subsection (a)(7) of this section, of the setoff of any mutual debt and claim that are commodity futures contracts, forward commodity contracts, leverage transactions, options, warrants, rights to purchase or sell commodity futures contracts or securities, or options to purchase or sell commodities or securities;

(7) under subsection (a) of this section, of the commencement of any action by the Secretary of Housing and Urban Development to foreclose a mortgage or deed of trust in any case in which the mortgage or deed of trust held by said Secretary is insured or was formerly insured under the National Housing Act and covers property, or combinations of property, consisting of five or more living units; or

(8) under subsection (a) of this section, of the issuance to the debtor by a governmental unit of a notice of tax deficiency.

(c) Except as provided in subsections (d), (e) and (f) of this section—

(1) the stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate; and

(2) the stay of any other act under subsection (a) of this section continues until the earliest of—

(A) the time the case is closed;

(B) the time the case is dismissed; and

(C) if the case is a case under chapter 7 of this title concerning an individual or a case under chapter 9, 11, or 13 of this title, the time a discharge is granted or denied.

(d) On request a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay—

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest; or

(2) with respect to a stay of an act against property, if—

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization.

(e) Thirty days after a request under subsection (d) of this section for relief from the stay of any act against property of the estate under subsection (a) of this section, such stay is terminated with respect to the party in interest making such request, unless the court, after notice and a hearing, orders such stay continued in effect pending, or as a result of, a final hearing and determination under subsection (d) of this section.

A hearing under this subsection may be a preliminary hearing, or may be consolidated with the final hearing under subsection (d) of this section. If the hearing under this subsection is a preliminary hearing—

(1) the court shall order such stay so continued if there is a reasonable likelihood that the party opposing relief from such stay will prevail at the final hearing under subsection (d) of this section; and

(2) such final hearing shall be commenced within thirty days after such preliminary hearing.

(f) The court, without a hearing, shall grant such relief from the stay provided under subsection (a) of this section as is necessary to prevent irreparable damage to the interest of an entity in property, if such interest will suffer such damage before there is an opportunity for notice and a hearing under subsection (d) or (e) of this section.

(g) In any hearing under subsection (d) or (e) of this section concerning relief from the stay of any act under subsection (a) of this section—

(1) the party requesting such relief has the burden of proof on the issue of the debtor's equity in property; and

(2) the party opposing such relief has the burden of proof on all other issues.

Opposition

Supreme Court, U.S.
FILED
MAR 22 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1570

In the Supreme Court of the United States

October Term, 1981

LEIGH R. HARLOW and EVELYN D. HARLOW,
PETITIONERS,

v.

JOHN B. SARGENT and FREDERIC D. SARGENT,
RESPONDENTS.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

F. J. Glover
Matthew T. Birmingham, III
Fink & Birmingham, P.C.
P.O. Box 217
Ludlow, Vermont 05149
Tel: (802) 228-4111

Attorney for Respondents

In the
Supreme Court of the United States

October Term, 1981

No. 81-1570

LEIGH R. HARLOW and EVELYN D. HARLOW,
PETITIONERS,

JOHN B. SARGENT and FREDERIC D. SARGENT,
RESPONDENTS.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

JOHN B. SARGENT and FREDERIC D. SARGENT, Respondents herein, pray that a Writ of Certiorari sought by Petitioners in the above captioned matter to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered on November 22, 1981. (C.A. No. 81-5043; D.C. No. Civil Action 81-117) be denied.

TABLE OF CONTENTS

	Page
Table of Authorities	1
Reference to Official and Unofficial Reports of Opinions Delivered in the Courts Below	2
Statement of Jurisdiction	2
Statement of the Case	2
Reasons for Denying the Writ	4
Conclusion	5

Table of Authorities

Baltimore Contractors, Inc. v Bodinger, 348 U.S. 176, 181 (1955)	4
Griffin v. Illinois, 351 U.S. 12, 18 (1955)	4
McKane v. Durston, 153 U.S. 684, 688 (1893)	4
Miree v. DeKalb County, 433 U.S. 25 (1977)	5
Tennessee v. Dunlap, 426 U.S. 312, (1976)	5

Official and Unofficial Reports of Opinions Delivered in the Courts Below

The opinion of the United States Court of Appeals for the Second Circuit (C.A. No. 81-5043), the opinion of the United States District Court for the District of Vermont, and the opinion of the United States Bankruptcy Court for the District of Vermont, are attached hereto as "Appendix A, B, and C" respectively.

Statement of Jurisdiction

It is the position of the Respondents herein that the Honorable Supreme Court is without jurisdiction to review the judgment of the United States Court of Appeals for the Second Circuit based upon the dictates of 28 United States Code, Section 1478, which statute states in part:

(a) A party may remove any claim or cause of action in a civil action, other than a proceeding before the United States Tax Court, or a civil action by a Government unit to enforce such governmental unit's police or regulatory power, to the Bankruptcy Court for the district which such civil action is pending, if the Bankruptcy Courts have jurisdiction over such claim or cause of action.

(b) The court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground. *An order under this subsection remanding a claim or cause of action, or a decision not so remanding, is not reviewable by appeal or otherwise.* (emphasis supplied)

Statement of the Case

Respondents held a valid mortgage on the lands and premises of the Petitioners in West Windsor, Vermont. In June of 1980 Respondents filed a Summons and Complaint of Foreclosure in the Vermont Superior Court for Windsor County in accordance with the provisions of 12 Vermont Statutes Annotated 4523. Respondents failed to file a Verified Answer as required by

Vermont law and on October 29, 1980 the Court granted Respondents' Motion for Default Judgment and ordered the property to be sold at a public sale on December 1, 1980. After the required notice and advertisement, the sale was held, pursuant to the Order of the Windsor Superior Court for the State of Vermont, on December 1, 1980. On December 24, 1980 said sale was confirmed by the Windsor Superior Court.

On November 20, 1980 the Respondents filed a Chapter 13 Petition in the United States Bankruptcy Court for the District of Vermont.

Subsequent to filing their Chapter 13 Petition, the Respondents moved the Court to remove the foreclosure action from the Windsor Superior Court to the Bankruptcy Court under the provisions of 28 United States Code Section 1478 (Harlow v. Sargent, Case No. 80-00252). The Court held a hearing on the Motion at which both parties were present and represented by counsel. In an Order and Memorandum dated January 2, 1981 Judge Marro, of the Bankruptcy Court, while recognizing that the Bankruptcy Act might allow the Court to assume jurisdiction of the foreclosure action, held that equitable considerations dictated remand to the State Superior Court under the provisions of 28 United States Code Section 1478 (b). The Court based its decision, in part, on the fact that the foreclosure action had been fully adjudicated in the State proceedings, the Respondents-Mortgagors have had a full opportunity to defend the action and to present the defenses they now claim exist, and on the fact that the Petitioners-Mortgagees should not be compelled to prosecute another foreclosure proceeding. (Memorandum and Order, Case No. 80-00-252, January 2, 1981, P. 4).

Petitioners subsequently filed a Motion for a Rehearing under Rule 812, and additionally, filed a Complaint to punish the Respondents for contempt and for a Declaratory Judgment. After a hearing, the Court, in a Memorandum and Order dated March 16, 1981, confirmed its previous Order remanding the action back to the State Court and denied both the Complaint for Contempt and for a Declaratory Judgment.

On March 19, 1981 Petitioners filed a Notice of Appeal with the

United States District Court for the District of Vermont. (Harlow v. Sargent, File No. 81-117). Subsequently, Respondents filed a Motion to Dismiss the Appeal based upon the dictates of 28 United States Code Section 1478 (b) which expressly prohibits an Appeal from an Order remanding a cause of action to a State Court. A hearing was held by the Honorable James Holden on May 29, 1981. In a Memorandum of Decision dated June 24, 1981 the District Court granted Respondents' Motion to Dismiss, citing the express dictates of 28 United States Code Section 1478(b).

An Appeal from this Order was filed on July 17, 1981 to the Second Circuit Court of Appeals, which Appeal was denied on November 27, 1981.

Reasons for Denying the Writ

It is the Respondents' position herein that the Petition for a Writ of Certiorari in the herein matter should be denied for the following reasons:

(1) The succinct and exacting language of 28 United States Code Section 1478 (b) states that an Order of Remand as was made in this matter by the Honorable Bankruptcy Court is not reviewable by *Appeal or otherwise*. This statute is unambiguous and constitutional in that the power of a Federal Court to conduct appellate review extends only so far as expressly reduced directly or indirectly by the Courts. Additionally, there exists no right of appellate review at common law, nor is it a necessary element of due process. *Baltimore Contractors, Inc. v Bodinger*, 348 U.S. 176, 181 (1955); *McKane v. Durston*, 153 U.S. 684, 688 (1893); *Griffin v. Illinois*, 351 U.S. 12, 18 (1955).

(2) The purported issue or question presented for review by Petitioners is presented to the Honorable Supreme Court for the first time as a Petition for a Writ of Certiorari. The purported question presented was not raised or argued to the Federal District Court for the District of Vermont nor was it raised or argued to the Honorable United States Court of Appeals for the Second Circuit. The sole challenge raised by Petitioners in the United States Court of Appeals for the Second Circuit was as to

the constitutionality of 28 United States Code Section 1478 (b). Petitioners are prohibited from raising their presented question for the first time to the Honorable Supreme Court. *Miree v. DeKalb County*, 433 U.S. 25, (1977), *Tennessee v. Dunlap*, 426 U.S. 312, (1976).

Conclusion

Petitioners' Writ of Certiorari to the United States Court of Appeals for the Second Circuit should be denied for lack of jurisdiction according to 28 United States Code Section 1478 (b) and for failure to raise the question presented in the lower Courts.

★ authorized by Congress, and that jurisdiction cannot be extended or

Appendix

"APPENDIX A"

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-seventh day of November one thousand nine hundred and eighty-one.

Present:

Honorable Irving R. Kaufman,
Honorable William H. Timbers,
Honorable Thomas J. Meskill,
Circuit Judges,

81-5043

LEIGH R. HARLOW and EVELYN D. HARLOW,
APPELLANTS,
v.
JOHN B. SARGENT and FREDERIC D. SARGENT,
APPELLEES.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Vermont, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

1. Appellants challenge the constitutionality of 28 U.S.C. §1478 (b). They argue that, when a Bankruptcy Court's remand order concerns property which is part of a proposed bankruptcy plan pursuant to 11 U.S.C. §§1301—30, the statutory prohibition against appeal of that order works a deprivation of property without due process of law. The power of a federal court to conduct appellate review extends only so far as authorized by Congress. *See Baltimore Contractors, Inc. v. Bodinger*, 348 U.S. 176, 181 (1955). The right to appellate review is not, in all instances, a necessary element of due process.
2. Moreover, the provisions of the Bankruptcy Act should be upheld against a constitutional challenge unless they are "so grossly arbitrary and unreasonable as to be incompatible with fundamental law." *In re Hill*, 4 B.R. 310, 315 (N.D. Ohio 1980).
3. Section 1478 (b) is not per se unconstitutional or "arbitrary." Nor has it affected appellants Harlow in an unconstitutional manner. They had full opportunity to protect their property rights in a state proceeding. The Windsor Vermont Superior Court granted the Sargents' motion for default judgment after the Harlows, with assistance of counsel, failed to file a verified answer. The property was ordered sold. Prior to the sale, the Harlows attempted to have the foreclosure proceeding removed to the Bankruptcy Court.
4. 11 U.S.C. §§ 1301—30 is intended to protect and encourage rehabilitation by debtors. This policy, however, does not extend to allowing a debtor, who has had his day in court, to relitigate the same issue in Bankruptcy Court at added expense and time to his creditor. *See In re Tidwell*, 4 B.R. 100 (N.D. Tex. 1980). This reasoning is particularly applicable when questions of state law, such as in this foreclosure action are involved. *See In re Calabria*, 5 B.R. 73 (D. Conn.

1980). Accordingly, Judge Holden properly dismissed the Harlows' appeal for lack of subject matter jurisdiction.

5. Since there is no jurisdiction to entertain an appeal, appellants' other claims are not properly before the court.

(s) IRVING R. KAUFMAN,
(s) WILLIAM H. TIMBERS,
(s) THOMAS J. MESKILL, *Circuit Judges.*

"APPENDIX B"

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

No. 81-117
LEIGH R. HARLOW and EVELYN B. HARLOW,
v.
JOHN B. SARGENT and FREDERIC D. SARGENT

Memorandum of Decision

This case comes before the court as an appeal from a Bankruptcy Court decision in which the underlying foreclosure proceedings were remanded to the Windsor Superior Court following appellant's petition for removal from that state court to the Bankruptcy Court in this District. *Harlow v. Sargent*, Adversary No. 80-146 (Bkr. Vt. Jan. 2, 1981), aff'd on reh. (Mar. 16, 1981).

Appellees have moved to dismiss this appeal on alternate grounds: that under 28 U.S.C. §1478 (b) this court has no jurisdiction to hear the appeal, and that appellants' failure to file their brief in support of the appeal in a timely manner requires dismissal. Appellants contend the motion should be denied on both grounds. They raise a constitutional challenge to the statutory prohibition against appeals from remand orders found in §1478 (b), and further argue that the appeal should not be dismissed as untimely.

The record on appeal shows that in June, 1980 appellees instituted a foreclosure action in Windsor Superior Court on a mortgage they held on appellants' land. On October 29, 1980 the court granted appellee's motion for default judgment and ordered the property sold. On the same day, appellants moved for review of the default judgment. Prior to the sale, appellants also filed in the Bankruptcy Court a petition for relief under

Chapter 13 of the Bankruptcy Act, 11 U.S.C. §1301 et seq., and for removal of the foreclosure action.

The Superior Court denied the appellants' motion for review of the default judgment. The sale of the property took place as ordered and was subsequently confirmed by the court. Appellants then filed a complaint against appellees in the Bankruptcy Court, seeking to have them punished for contempt, through the sale, of the automatic stay provisions of 11 U.S.C. §362 and requesting a judgment declaring null and void all state proceedings since the Chapter 13 filing.

The Bankruptcy Court dismissed appellants' motion for removal to that court. While recognizing that the new Bankruptcy Act might allow the court to assume jurisdiction of the foreclosure action, the court concluded that, under §1478 (b), equitable considerations dictated remand to the state court. The court noted that the foreclosure action had been fully adjudicated in the state proceedings, that the debtors had had full opportunity to protect their interests throughout those proceedings, and that under these circumstances the mortgagees should not be compelled to prosecute another foreclosure proceeding. Memorandum and Order, No. 80-252 (Jan. 2, 1981).

The debtors moved for a rehearing, asserting the Order was based on erroneous statements of fact and conclusions of law. The court confirmed its prior decision in another memorandum and order, emphasizing that a party cannot relitigate an action by means of removal where, as here, they appear simply to be dissatisfied with the initial result. Memorandum and Order, No. 80-252 (Mar. 16, 1981). The debtors then brought this appeal from that decision.

Section 1478 (b) prohibits an appeal from the remand of an action removed to the Bankruptcy Court:

> (b) The court to which [a] claim or cause of action is removed may remand such claim or cause of action on any equitable ground. An order under this subsection remanding a claim or cause of action, or a decision not so remanding, is not reviewable by appeal or otherwise.

Appellees reply on the clear directive of the statute in support of their motion to dismiss this appeal. Appellants challenge the statute's constitutionality, alleging that when a remand order concerns property which is part of a Chapter 13 rehabilitation plan, the inability to appeal that order works a deprivation of property without due process of law.

The power of a federal court to conduct appellate review extends only so far as expressly authorized by Congress and that jurisdiction cannot be extended or reduced, directly or indirectly, by the courts. *See Baltimore Contractors, Inc. v. Bodinger*, 348 U.S. 176, 181 (1955). No right to appellate review existed at common law, nor has it been considered a necessary element of due process. *McKane v. Durston*, 153 U.S. 684, 688 (1893); *see also Griffin v. Illinois*, 351 U.S. 12, 18 (1955).

Orders remanding to the state court actions removed to the federal district court are not reviewable, except in civil rights cases. 28 U.S.C. §1447 (d). The purpose of this bar on appellate review is to spare litigants delay, *In Re McNeil Bros.* 259 F.2d 386, 388 (1st Cir. 1958), and is consistent with the strong federal policy against allowing appeals from preliminary rulings establishing a forum. *See U.S. Tour Operators Ass'n v. Trans World Airlines*, 556 F.2d 126, 129 (2d Cir. 1977).

In light of these established principles, the prohibition against appeals found in §1478 (b) is not per se unconstitutional, nor can it be said that the statute has operated against these appellants in an unconstitutional manner. The record indicates that the appellants had full opportunity to protect their property rights in the state proceedings, whether or not they chose to avail themselves of those opportunities. As Judge Marro recognized, Chapter 13 is intended to protect and encourage rehabilitation by debtors. However, this policy does not extend to allow such a debtor, who has had his day in court, to relitigate the same issues in the Bankruptcy Court, causing additional expense and delay to his opponent. *See In Re Tidwell*, 4 B.R. 100 N.D. Tex. 1980). This reasoning is particularly aposite where the suit involves questions of state law, as in this foreclosure action. *See In Re Calabria*, 5 B.R. 72, 75 (D. Conn. 1980).

Since 28 U.S.C. §1447 (d) and §1478 (b) prohibit this court from exercising the power to review the order of remand, *Kloeb v. Armour*, 311 U.S. 199, 205 (1940), the appellees' motion to dismiss the appeal is hereby granted. It is so ORDERED.

Dated at Rutland, in the District of Vermont, this 24th day of June, 1981.

James S. Holden
Chief Judge

"APPENDIX C"

UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT

No. 80-00252

LEIGH R. HARLOW and EVENLYN B. HARLOW,
DEBTORS.

Memorandum and Order

This is a contested proceeding on the Application of the Debtors to remove a pending foreclosure action from State Court. Appearances are:

Jerome I. Meyers, Esquire, for the Debtors,
Fink and Birmingham, P.C., for John B. Sargent and Frederic D. Sargent, mortgagees —
plaintiffs in the foreclosure proceeding.

The foreclosure action which the Debtors seek to remove to the Bankruptcy Court was instituted in the Windsor Superior Court by John B. Sargent and Frederic D. Sargent as mortgagees against the Debtors and Agway, Incorporated, by Complaint dated June 6, 1980 with summons served on June 17, 1980.

This foreclosure action has proceeded to a default judgment against the Debtors because of their failure to file a verified answer as required by the pertinent state court rule.

In their Application for Removal the Debtors allege that the property involved in the foreclosure action is their homestead farm and that they have good and equitable defenses to the action under appropriate law and that the interests of justice will best be served by granting such removal.

The plaintiffs in the state foreclosure proceeding resist removal on the ground that no verified answer has been filed; that the alleged real defenses to the foreclosure action have not existed and do not exist nor have they been raised properly in the more than seven months that the foreclosure action has been filed in the Windsor Superior Court.

The Debtors seek removal to 28 U.S.C. §1478 which provides as follows:

> "§1478. Removal to the bankruptcy courts.
> (a) A party may remove any claim or cause of action in a civil action, other than a proceeding before the United States Tax Court or a civil action by a Government unit to enforce such governmental unit's police or regulatory power, to the bankruptcy court for the district where such civil action is pending, if the bankruptcy courts have jurisdiction over such claim or cause of action.
> "(b) The court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground. An order under this subsection remanding a claim or cause of action, or a decision not so remanding, is not reviewable by appeal or otherwise."

The assumption of jurisdiction by removal over a foreclosure action pending in state court presents a novel situation. As pointed out by the plaintiff-mortgagees in that action the foreclosure of a mortgage on real property is a purely state proceeding. See 12 V.S.A. 4523 under which actions to foreclose a mortgage shall be brought before the county court (now superior court) of the county where the land lies with all proceedings to be held before the presiding judge alone. (subsections a and c).

Under the old Bankruptcy Act it was inconceivable that the Bankruptcy Court could assume jurisdiction over a state foreclosure action. This no longer prevails. Now, under the Bankruptcy Code, specifically by virtue of 28 U.S.C. 1471 the jurisdiction of the Bankruptcy Court has been greatly expanded. Under this section the Bankruptcy Court, as an adjunct of the District Court, has original and exclusive jurisdiction of all causes under Title II and also has original but not exclusive jurisdiction of all civil proceedings arising under Title II or arising in or related to cases under Title II. Further the Bankruptcy Court in which a case under Title II is commenced shall have exclusive jurisdiction of all of the property, wherever located, of the debtor, as of the commencement of such case. See subsections a, b and e of 28 U.S.C. 1471.

The pervasive jurisdiction granted to the Bankruptcy Court under Section 1471 is defined in the House Report as follows:

> "Subsection (b) is a significant change from current law. It grants the bankruptcy court original (trial), but not exclusive, jurisdiction of all civil proceedings arising under Title II or arising under or related to cases under Title II. This is the broadest grant of jurisdiction to dispose of proceedings that arise in bankruptcy cases or under the bankruptcy code. Actions that formerly had to be tried in State court or in Federal district court, at great cost and delay to the estate, may now be tried in the bankruptcy courts. The idea of possession or consent as the sole bases for jurisdiction is eliminated. The bankruptcy court is given in personam jurisdiction (sic) as well as in rem jurisdiction to handle everything that arises in a bankruptcy case.
>
> "The jurisdiction granted is of all proceedings arising under Title II or arising under or related to a case under Title II. The bill uses the term 'proceeding' instead of the current 'matters and proceedings' found in the Bankruptcy Act and Rules. The change is intended to conform the terminology of Title 28, under which anything that occurs within a case is a proceeding. Thus, proceeding here is used in its broadest sense, and would encompass what are now called contested matters, adversary proceedings, and plenary actions under the current bankruptcy law. It also includes any disputes related to administrative matters in a bankruptcy case.
>
> "The use of the term 'proceeding.' though, is not intended to confine the bankruptcy case. Very often, issues will arise after the case is closed, such as over the validity of a purported reaffirmation agreement, proposed 11 U.S.C. 524 (b), the existence of prohibited post-bankruptcy discrimination, proposed 11 U.S.C. 525, the validity of securities issued under a reorganization plan, and so on. The bankruptcy courts will be able to hear these proceedings because they arise under Title II.

"The phrase 'arising under' has a well defined and broad meaning in the jurisdictional context. By a grant of jurisdiction over all proceedings arising under Title II, the bankruptcy courts will be able to hear any matter under which a claim is made under a provision of Title II. For example, a claim of exemptions under 11 U.S.C. 522 would be cognizable by the bankruptcy court, as would a claim of discrimination in violation of 11 U.S.C. 525. Any action by the trustee under an avoiding power would be a proceeding arising under Title II, because the trustee would be claiming based on a right given by one of the sections in subchapter III of chapter 5 of Title II. Many of these claims would also be claims arising under or related to a case under Title II. Indeed, because Title II, the bankruptcy code, only applies once a bankruptcy case is commenced, any proceeding arising under Title II will be in some way 'related to' a case under Title II. In sum, the combination of the three bases for jurisdiction, 'arising under Title II,' arising under a case under Title II,' and 'related to a case under Title II,' will leave no doubt as to the scope of the bankruptcy court's jurisdiction over disputes."

It seems abundantly clear that the foreclosure action now pending in the State Court is one over which the Bankruptcy Court could assume jurisdiction by removal pursuant to 28 U.S.C. 1478. However, under subdivision (b) of this section the bankruptcy court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground and an order remanding or not remanding is not reviewable. This right of the Bankruptcy Court to abstain from an action removed pursuant to 28 U.S.C. 1478 (a) should only be exercised where the interests of all the parties would best be served. In Re Project Oneco, Inc. 1 Collier 2d 711.

The plaintiff mortgagees have in their memorandum incorporated a request to remand on equitable grounds. They recite that the foreclosure action has progressed to the entry of a default judgment; that the debtors have had a full opportunity to

required by the State Court rule; that their motion for review has been denied by the State Court; that as mortgagees they have gone to considerable expense by way of attorney's fees and court costs and that the debtors over a period of seven months since the institution of the foreclosure action have been given a full opportunity to present whatever legal defense they might have had to the foreclosure. In effect, they have had their day in court.

The record in the State case seems to support the mortgagees' position and they should not be compelled to come into Bankruptcy Court to defend another foreclosure proceeding ab initio at additional expense and delay. Equity dictates otherwise. If the debtors have any other rights such as exemptions these may be severed and left for determination by the Bankruptcy Court. See *In Re Calabria* 2 Collier 2d Sec. 113.

Order

Upon the foregoing, IT IS ORDERED that the Motion of the Debtors to Remove is DISMISSED.

Dated at Rutland, Vermont, this 2nd day of January, 1981.

Charles J. Marro
U.S. Bankruptcy Judge